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11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION
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17 AARON GREENSPAN,

18 Plaintiff,

19 vs.

20 OMAR QAZI, SMICK ENTERPRISES, INC.,
21 ELON MUSK, and TESLA, INC.,

22 Defendants.
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Case No. 3:20-cv-03426-JD

**TESLA DEFENDANTS' REPLY IN
SUPPORT OF REQUEST FOR JUDICIAL
NOTICE AND CONSIDERATION OF
DOCUMENTS INCORPORATED BY
REFERENCE**

Trial Date: None set
Date Action Filed: May 20, 2020

Defendants Tesla, Inc. and Elon Musk (“Tesla Defendants”) respectfully submit this reply in further support of their Request for Judicial Notice and Consideration of Documents Incorporated by Reference (ECF No. 143-10; the “Tesla RJN”). As an initial matter, Plaintiff’s Response to Tesla Defendants’ Request for Judicial Notice (ECF No. 151; the “Response”) does not contest Tesla Defendants’ request to incorporate by reference Tesla RJN Exhibits 1 and 3.

I. ARGUMENT

A. Plaintiff Misapplies the Ninth Circuit’s Opinion in *Khoja v. Orexigen Therapeutics, Inc.*

Plaintiff invokes the Ninth Circuit’s opinion in *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988 (9th Cir. 2018), to lodge a generalized attack on Tesla’s RJN by claiming that “defendants have a tendency to abuse requests for judicial notice in securities actions.” Response at 2. Plaintiff’s reliance on *Khoja* is misplaced. There, the Court of Appeals held that the district court erred by taking judicial notice of, among other things, the fact that the defendant drug manufacturer had told the market that a key study was ending based on a transcript of an investor event. The court reasoned that because the transcript itself provided conflicting information about the study’s status, and because the complaint had otherwise pleaded that investors were misled, judicial notice was improper. 899 F.3d at 1000.

Khoja is inapposite for three reasons. **First**, the court in *Khoja* was concerned with the truth of facts asserted in documents to be noticed, whereas here (as explained below), the Tesla Defendant’s RJN Exhibits 4-7 concern the existence of documents or statements, not to the truth of the matters asserted in those documents or statements. **Second**, as this Court has noted, “*Khoja* does not prevent a defendant from using the doctrines of judicial notice or incorporation by reference to create factual disputes with a plaintiff’s conclusory allegations.” *In re Eventbrite, Inc. Sec. Litig.*, No. 5:18-CV-02019- EJD, 2020 WL 2042078, at *7 (N.D. Cal. Apr. 28, 2020). **Third**, “nothing in *Khoja* prevents this Court from analyzing an alleged false statement in context,” as the Tesla Defendants ask this Court to do by considering Exhibit 2’s forward-looking statements in its full context. *Id.*; *see also Khoja*, 899 F.3d at 1002 (noting that incorporation by reference “prevents

1 plaintiffs from selecting only portions of documents that support their claims, while omitting
2 portions of those very documents that weaken—or doom—their claims.”).

3 **B. Tesla RJN Exhibit 2 Should be Incorporated by Reference into the 4AC.**

4 Plaintiff argues that an investor event transcript containing the *very same* statements he
5 challenges as fraudulent are not proper subjects of incorporation. This argument fails.

6 Exhibit 2 is properly incorporated by reference into the Plaintiff’s Fourth Amended
7 Complaint (ECF No. 131, “4AC”). Plaintiff does not challenge its authenticity, and cannot maintain
8 that it is not “central” to his claim, given that it contains purportedly false statements alleged in the
9 4AC’s Issue 9. *See Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010) (discussing
10 requirements of authenticity and centrality); 4AC Issue 9 at 61:16-18 (challenging statements made
11 in the earnings call as false or misleading as to the production of the Tesla Semi). Indeed, perhaps
12 no use of the incorporation by reference doctrine is more routine at the pleadings stage than to
13 provide the full context of statements challenged in securities litigation. *See In re NVIDIA Corp.*
14 *Sec. Litig.*, 768 F.3d 1046, 1058 n. 10 (9th Cir. 2014) (“Because Plaintiffs incorporate by reference
15 [a] declaration, relying on portions of it in their complaint, we may properly consider the declaration
16 in its entirety.”).

17 Moreover, that the transcript contains the statements at issue is not a fact subject to
18 reasonable dispute. Accordingly Exhibit 2 is proper subjects of judicial notice for that purpose. *See,*
19 *e.g., Shenwick v. Twitter, Inc.*, 282 F. Supp. 3d 1115, 1122 (N.D. Cal. 2017) (taking judicial notice
20 of documents including investor event transcripts for the fact of the statements contained therein).

21 Plaintiff’s reliance on a case involving “the truth of the contents of the exhibits” is again
22 misplaced as to both incorporation by reference and judicial notice. Response at 3 (quoting *Clorox*
23 *Co. v. Reckitt Benckiser G.p. PLC*, 398 F. Supp. 3d 623, 639 (N.D. Cal. 2019)). The Tesla
24 Defendants request that the Court merely note the fact that Jerome Guillen’s statements were
25 accompanied by cautionary language and an indication that the statements were forward-looking;
26 the truth of anything asserted in Exhibit 2 is not at issue. *See* Tesla Defendants’ Motion to Dismiss
27 the Fourth Amended Complaint (ECF No. 143, “Motion”) at 9.

28 **C. Tesla RJN Exhibits 4-7 Can Be Judicially Noticed.**

1 Plaintiff himself relies on Tesla Defendants’ request to judicially notice Exhibits 4-7 as
 2 support for his own Request for Judicial Notice, thereby conceding the propriety of the request. *See*
 3 ECF No. 150 at 3. Nonetheless, in his Response, Plaintiff objects to the notice of these Exhibits
 4 because Exhibit 4 rebuts the allegations of the 4AC and Exhibits 5-7 “do not concern allegations in
 5 this lawsuit.” Response at 3. Plaintiff’s arguments are misplaced in both regards.

6 **Exhibit 4.** Plaintiff acknowledges that he authored the “Reality Check” report in which he
 7 accused the Tesla Defendants of engaging in various fraudulent and misleading acts. *Id.* That ends
 8 the inquiry into judicial notice: it is beyond reasonable dispute that Plaintiff made the allegations
 9 contained in the report, and this Court may take notice of the existence of these statements. *See,*
 10 *e.g., Shenwick*, 282 F. Supp. 3d at 1122-23 (taking judicial notice of media reports published in
 11 online outlets where “Plaintiff does not question their authenticity”).

12 Plaintiff incorrectly asserts that “the mere fact that Plaintiff contests [Tesla Defendants’]
 13 view” of Exhibit 4’s importance “means that the document cannot be considered.” Response at 3.
 14 The Tesla Defendants cite to this document to show that Plaintiff could not have reasonably relied
 15 on the alleged fraud in purchasing put options because he suspected the Defendants of perpetrating
 16 various acts of fraud well before he ever made those purchases. Motion at 12-13; *In re Eventbrite*,
 17 2020 WL 2042078, at *7 (noting propriety of judicial notice where a complaint contains only
 18 conclusory assertions). That Plaintiff disagrees with the Tesla Defendants’ legal arguments based
 19 on this document is not a proper basis to oppose judicial notice, and Plaintiff’s citation to *Baird v.*
 20 *BlackRock Institutional Trust Co., NA.* does not further his cause. That case simply articulates that
 21 a court may not take judicial notice “of the truth of the information contained in” a document to
 22 rebut allegations in a complaint on a motion to dismiss. 403 F. Supp. 3d 765, 777 (N.D. Cal. 2019).

23 **Exhibits 5-7.** Plaintiff concedes that he is the author of the tweets contained in Exhibits 5-
 24 7. Response at 3. Accordingly, because it is beyond reasonable dispute that Plaintiff made the
 25 statements contained in the tweets, this Court may take notice of the existence of them. *See*
 26 *Shenwick*, 282 F. Supp. 3d at 1122-23.

27 Moreover, that Exhibits 4-7 do not appear in the 4AC as Plaintiff argues, Response at 3, is
 28 irrelevant to judicial notice, because the Tesla Defendants do not seek incorporation by reference of

1 these exhibits. Plaintiff misstates and conflates the standards governing judicial notice and
2 incorporation by reference by asserting that this Court may take judicial notice of an exhibit only if
3 “the complaint necessarily relies” upon it or “alleges the contents of the document.” Response at 2.
4 That, however, is the standard for incorporation by reference, not at issue for these exhibits. *United*
5 *States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Judicial notice does not depend on the
6 allegations in Plaintiff’s complaint, but is appropriate for any fact “not subject to reasonable
7 dispute.” Fed. R. Evid. 201.

8 **II. CONCLUSION**

9 For all of the reasons above, this Court should grant Tesla Defendants’ RJN and
10 incorporate by reference and/or take judicial notice of Exhibits 1-7.

11 DATED: December 23, 2021

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14 By /s/ Michael T. Lifrak
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